SUPREME COURT, U. S.

APR 18 1972

MICHAEL RODAK, JR., CLERK

71-1344

IN THE

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1971

NO. A-971

MICHAEL DE TORE,
Also Known As MICHAEL
HAYS, Petitioner

v.

UNITED STATES OF
AMERICA, Respondent

PETITION FOR A WRIT
OF CERTIORARI TO THE
UNITED STATES COURT
OF APPEALS FOR THE
SECOND CIRCUIT

THEODORE L. MALATESTA
250 Broadway
New York, New York 10038

Counsel for Petitioner

April 17, 1972

INDEX

	Page
Statement as to no opinion below	2
Jurisdiction	3
Questions presented	4
Statutory provisions involved	11
Rules of the Supreme Court involved	15
Federal Rules of Criminal Procedure involved	16
Statement of the case	16
Reasons for granting the writ	40
Conclusion	4
Appendix (Judgment of Court of Appeals)	App. 1

CITATIONS

CASES:

Bollenbach v. United States, 326 U.S. 607 ..... 9, 43

Page

Harris v. New York,
401 U.S. 222 ..... 6, 42

Miranda v. Arizona,
384 U.S. 436 ..... 6, 29, 42

Pinckney v. United States,
352 F. 2d 69, 70 ..... 9, 43

United States v. Braxton,
417 F. 2d 878, 880 ..... 9, 43

STATUTES

18 U.S.C. sec. 2 13

18 U.S.C. sec. 2113 11

18 U.S.C. sec. 5010 13

18 U.S.C. sec. 5017 14

RULES

Rules of the Supreme Court,
Rule 40(1)(d)(2) 15

Federal Rules of Criminal
Procedure, Rule 52(b) 16

Page

MISCELLANEOUS

Stern and Gressman
Supreme Court Practice
(4th Ed., 1969), p. 299 15

IN THE

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1971

NO. A-971

MICHAEL DE TORE,
Also Known As MICHAEL
HAYS, Petitioner

v.

UNITED STATES OF
AMERICA, Respondent

PETITION FOR A WRIT
OF CERTIORARI TO THE
UNITED STATES COURT
OF APPEALS FOR THE
SECOND CIRCUIT

The petitioner Michael De Tore respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this proceeding

on February 18, 1972.

The judgment affirmed a judgment of the United States District Court for the Eastern District of New York, (a) convicting petitioner of the crime of armed bank robbery, in violation of 18 U.S.C. section 2113(d) and 18 U.S.C. sec. 2 (the bank's deposits were insured by the Federal Deposit Insurance Corporation; see 18 U.S.C. section 2113, subd. "f"), and (b) sentencing him to ten (10) years in prison.

A copy of the judgment is set out in the Appendix hereto.

NO OPINION BELOW

The Court of Appeals for the Second Circuit, in entering its judgment, did not render an opinion.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on February 18, 1972.

On March 20, 1972, petitioner filed with the Clerk of this Court an application addressed to Honorable Thurgood Marshall, an Associate Justice of this Court, for a 30-day extension of the time of petitioner to file a petition for a writ of certiorari to review said judgment.

On March 21, 1972, Mr. Justice Marshall extended the time of petitioner to file a petition for writ of certiorari in this cause to and including April 18, 1972. This petition for such a writ is being filed by said date.

This Court's jurisdiction is invoked under 28 U.S.C. section 1254(1)

and Rules of this Court, Rule 22 (2).

QUESTIONS PRESENTED

1. Whether the common, every-day practice in criminal cases followed in all federal, as well as state, courts throughout the country, of postponing the sentencing of a defendant who has pleaded guilty but is to testify against a co-defendant, until after the conclusion of the trial of the co-defendant, violates the right of the said co-defendant to a fair trial, vouchsafed to him by the due process clause of the Fourteenth Amendment to the Constitution of the United States, in that, in considering and determining the issue whether the guilty-pleading defendant has or has not been promised consideration with respect to his sentence in exchange for his cooperation (the witness

invariably denies any such arrangement), the trial jury is effectively deprived of information relevant and material to said issue - namely, the nature and extent of the sentence ultimately imposed upon the guilty-pleading defendant, and the relationship thereof to the punishment which can be visited upon him.

2. Whether the violation of the due process clause referred to in "1" above amounts to "plain error" "affecting" the "substantial rights" of a defendant, within the meaning of Rule 52(b) of the Federal Rules of Criminal Procedure, which a Court of Appeals may notice, as well as "plain error", within the meaning of Rule 40(1)(d)(2) of the Rules of this Court, which this Court may notice.

3. Whether it is in conflict with the holding of this Court in Miranda

v. Arizona, 384 U.S. 436, as explicated in Harris v. New York, 401 U.S. 222, as well as the holding in Harris, supra, for a federal district court judge, in the trial of a criminal case, to do any, some or all of the following related things, each of which is admittedly seriously prejudicial to defendant:

(a) the trial judge permits the prosecutor, notwithstanding the fact that the government in its case-in-chief had not adduced any evidence concerning such subjects, to cross-examine the defendant respecting (I) the giving to him by an F.B.I. agent, preliminary to interrogation of "Miranda" warnings, (II) defendant's response to said warnings, (III) the interrogation of the defendant by said agent, and (IV) the giving to said agent, by the defendant, in response to said interrogation, of statements and

admissions relating to the crime charged in the indictment;

(b) the trial judge conducts a "Miranda" hearing, prior to, during which, and at the conclusion of which, he advises defense counsel that, if the defendant takes the stand at said hearing, he, the trial judge, will not believe anything that the defendant says, to which defense counsel responds, and the trial judge agrees, that defendant's taking the stand will thus constitute an exercise in futility, and defendant does not take the stand;

(c) the trial judge, after receiving, during the "Miranda" hearing, the testimony of the agent who interrogated defendant, concerning the giving by him to defendant of "Miranda" warnings, and defendant's response thereto - and no other testimony - the trial judge makes a

finding that the "Miranda" warnings were given to defendant;

(d) the trial judge then permits the government to call the agent who questioned the defendant, as a rebuttal witness, and permits the agent to give evidence concerning "Miranda" warnings allegedly given to the defendant, the ensuing interrogation, and defendant's alleged admissions and statements; and

(e) the trial judge permits the jury to consider said evidence, notwithstanding the fact that the agent, who did not orally advise defendant of his "Miranda" rights, but merely exhibited to him a paper specifying said rights, failed, in his rebuttal testimony, to give any evidence concerning defendant's response to the exhibition of said paper, so that the agent failed to give any evidence either that the defendant understood the warn-

ings or waived his rights with respect thereto.

4. Whether it is in conflict with the holding of this Court in Bollenbach v. United States, 326 U.S. 607, as well as the holdings in Pinckney v. United States, 352 F 2nd 69, 70 (5 Cir., 1965) and United States v. Braxton, 417 F 2nd 878, 880 (5 Cir., 1969), for a federal district court judge, in a criminal case, in response to the jury's post-charge request for all the testimony concerning a vital issue in the case, which was given by three witnesses, and eked out by a stipulation as to certain facts involving a fourth person, some of which testimony and evidence was unfavorable to defendant, while other portions were favorable to him - for the trial judge, in response to the jury's request for all of this evidence, to do the following: With-

out pausing to locate and examine in the trial transcript - a copy of which is in the courtroom - the requested testimony (embodied in 39 widely scattered portions of the record) and stipulation, he proceeds to give the jury a summary, or purported summary of same, which (1) digests, or purports to digest, the testimony of only two of the three witnesses referred to, (2) makes no reference to the stipulation, (3) is "blind" in nature - that is, the judge, in his summary, says "one witness stated....." (sic)"and the other witness said ....." (sic), without, however, naming or otherwise identifying for the jury either of said witnesses, (4) is incomplete to the point of fragmentariness, and (5) while making reference to certain portions of the requested testimony which were unfavorable to defendant, omits any reference to virtually all those portions of the requested

testimony and stipulation which were favorable to defendant.

Within half an hour of receiving the summary - the last word on the case which the jury gets from the judge - the jury returns a verdict finding defendant guilty.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 18, section 2113, in so far as pertinent, read and reads as follows:

> "Bank robbery and incidental crimes.
>
> (a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association .....

Shall be fined not more than $5,000 or imprisoned not more than twenty years, or both.

(b) Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association, shall be fined not more than $5,000 or imprisoned not more than ten years, or both; .....

.....

(d) Whoever in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not more than $10,000 or imprisoned not more than twenty-five years, or both.

.....

(f) As used in this section the term "bank" means any member bank of the Federal Reserve System, and any bank, banking association, trust company, savings bank, or other banking institution organized or oper-

ating under the laws of the United States, and any bank the deposits of which are insured by the Federal Deposit Insurance Corporation."

United States Code, Title 18, Section 2, read and reads:

"Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."

Title 18, U.S. Code, Section 5010, entitled "Sentence", in so far as pertinent, read and reads:

"(a) If the court is of the opinion that the youth offender does not need commitment, it may suspend the imposition or execution of sentence and place the youth offender on probation.

(b) If the court shall find that a convicted person is a youth offender, and the offense is punishable by imprisonment under applicable provisions of law other than this subsection, the court may, in lieu of the penalty of imprisonment other-

wise provided by law, sentence the youth offender to the custody of the Attorney General for treatment and supervision pursuant to this chapter until discharged by the Division as provided in section 5017(c) of this chapter.....

....."

U. S. Code, Title 18, section 5017, entitled, "Release of youth offenders", in so far as pertinent, read and reads as follows:

"(a) The Division may at any time after reasonable notice to the Director release conditionally under supervision a committed youth offender. When, in the judgment of the Director, a committed youth offender should be released conditionally under supervision he shall so report and recommend to the Division.

(b) The Division may discharge a committed youth offender unconditionally at the expiration of one year from the date of conditional release.

(c) A youth offender committed under section 5010(b) of this chapter shall be released

conditionally under supervision on or before the expiration of four years from the date of his conviction and shall be discharged unconditionally on or before six years from the date of his conviction.....

....."

RULES OF THE SUPREME COURT INVOLVED

Rule 40(1)(d)(2) of the Rules of this Court, entitled, "Briefs - in general", reads, in so far as pertinent:

"Questions not presented according to this paragraph will be disregarded, save as the court, at its option, may notice a plain error not presented."*

---

* Although the rule relates to briefs, it appears to be applicable to petitions for certiorari. Stern and Gressman, Supreme Court Practice (Fourth Ed.; 1969), p. 299.

FEDERAL RULES OF CRIMINAL PROCEDURE INVOLVED

Title 18, U.S.C., Federal Rules of Criminal Procedure, Rule 52(b), read and reads as follows:

> "Plain error.
>
> Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

STATEMENT OF THE CASE

The Indictment

The indictment in this case (reproduced at A-8 to A-9*) reads as follows:

---

*Numbers prefaced by "A-" refer to pages of petitioner's Appendix in the Court of Appeals.

"THE GRAND JURY CHARGES:

On or about the 8th day of February, 1971, within the Eastern District of New York, the defendant STUART MARK SIMON and the defendant EUGENE SCHWARTZ, aided and abetted by the defendant HIRAM JESUS BERENGUER, JR., and the defendant MICHAEL DE TORE, also known as Michael Hays, knowingly and wilfully by force, violence and intimidation took from the persons and presence of employees of the Eastern National Bank, 205 Hallock Road, Lake Grove, New York, approximately Twelve Thousand Seven Hundred Forty Five Dollars and Fifty Five Cents ($12,745.55) in United States currency, which money was in the care, custody,

control and management of the aforesaid bank, the deposits of which bank were then and there insured by the Federal Deposit Insurance Corporation, an act and offense in violation of Section 2113(a), Title 18, United States Code, and in the commission of this act and offense, the defendant STUART MARK SIMON and the defendant EUGENE SCHWARTZ, aided and abetted by the defendant HIRAM JESUS BERENGUER, JR., and the defendant MICHAEL DE TORE, also known as Michael Hays, assaulted and placed in jeopardy the lives of said bank employees as well as the lives of other persons present by the use of dangerous weapons. (Title 18, United States Code

Section 2113(d) and 2)."

A TRUE BILL

Steven Pappas

Foreman

Edward R. Neaher

United States Attorney"

The status, at the time of the trial of petitioner (who was tried alone), of the other defendants named in the indictment, two of whom pleaded guilty and testified against petitioner.

The defendant HIRAM JESUS BERENGUER, JR., who was not present at the trial of petitioner.

After being released on bail

following his arrest, the defendant BERENGUER fled the jurisdiction, and was still a fugitive at the time of the trial of petitioner (A-1, A-2, A-3, A-4).

He was apprehended and returned subsequent to the trial (A-3).

Thereafter he pleaded guilty under a lesser charge - bank robbery (but not armed bank robbery) - which omitted the allegations of the indictment concerning assault and the use of weapons (papers on file in office of Clerk of District Court for Eastern District of New York).

Subsequently, he was sentenced to six years in prison (papers on file in office of said Clerk).

The defendant EUGENE HOWARD SCHWARTZ, who pleaded guilty and testified against petitioner.

Prior to the trial, the defendant SCHWARTZ had pleaded guilty to a superseding information charging an offense less than that alleged in the indictment - namely, larceny of the money taken, in violation of 18 U.S.C. sec. 2113, sub. "b" (A-1, A-2, A-62; minutes of March 15, 1971, p. 15).

The defendant STUART MARK SIMON, who pleaded guilty and testified against petitioner.

The preceding references to the defendant SCHWARTZ apply also to the defendant SIMON (A-1, A-2, A-63; minutes of March 15, 1971, p. 15).

The government's case

The aborted plan of February 3, 1971.

Schwartz and one JOHN PETERS, testified that on February 3, 1971, at petitioner's home, petitioner conferred with them and the defendant Berenguer, and, according to Peters, another man, who was not identified and was not called as a witness (Minutes of April 7, 1971, 2 P.M., 5-13, 16-22;* 303-311).

Schwartz and Peters testified that petitioner described to them the physical lay-out of the bank, outlined the plan for robbing it, and supplied

---

*There are two (2) volumes of transcripts for April 7, 1971; one, labeled "10 o'clock A.M." (sic), with the pages numbered 1-15, contains the government's opening; the other, labeled "2.00 o'clock P.M." (sic), with the pages numbered 1-200, contains testimony. Numbers beyond 15 refer to post-opening pages of the trial transcript.

Schwartz and Peters - who were to enter the bank and carry out the robbery - with weapons and a gun to carry out the robbery, Schwartz and Peters, after the robbery, to meet petitioner and Berenguer, and transfer to the latter two the bag containing the weapons and money (Minutes of April 7, 1971, 2 PM, 8, 11, 17, 18, 19, 20-21, 24-27, 306-310, 338-339, 340, 341, 345).

Schwartz and Peters testified that all the participants in the conference, using two cars, then drove to the bank, in order to execute the robbery, but decided to abandon the project for that day, and returned to petitioner's home, where the weapons and bag were returned to petitioner, and it was agreed that the robbery would be carried out on some future occasion (21-25, 65-66, 308-315, 328, 332-336).

Petitioner's evidence as to the alleged conference of February 3, 1971, and the aborted plan.

Petitioner testified that all that happened at his home that day was that Berenguer - accompanied by Schwartz, Peters and another man--came to petitioner's home (371, 372, 370), asked him whether he, Berenguer, could leave with petitioner, for retrieval at some future time, a bag containing weapons (371, 370, 372, 373), petitioner agreed (373, 374), the bag with the weapons was left with petitioner (375), and the visitors left (375).

The events of February 8, 1971, the day of the actual robbery.

The government's case.

Schwartz and the defendant

Simon (each of whom had pleaded guilty to a lesser charge; see p. 21. supra) testified that on February 8, 1971, they and Berenguer conferred with petitioner at the latter's home (42-44, 161-162, 158-159).

Schwartz and Simon testified that petitioner described the physical lay-out of the bank, outlined the plan for the robbery, and supplied Schwartz and Simon - who were to enter the bank - with weapons and a bag to hold the weapons and proceeds of the robbery, which were, after the robbery, to be transferred to petitioner and Berenguer who would be waiting, in a car, near the bank (44-52, 161-165, 167-168).

Schwartz and Simon testified that all the participants in the conference, using two cars, then drove to the bank (52-53, 169).

Schwartz and Simon entered the bank, carried out the robbery, and took a quantity of cash (55, 56, 173).

Schwartz and Simon testified that the weapons and cash were put into the bag which petitioner had given them, that they entered the car in which they had driven to the bank, met petitioner and Berenguer, who were in another car, down the road, and transferred to the latter two the bag containing the weapons and cash (54-58, 129, 144-147, 173-175, 244-245, to be read with 259-260 and 156-157; 249).

The discovery of the weapons in the back yard of petitioner's home.

The day following the robbery, the weapons were discovered by police in petitioner's back yard, in a metal box

(285-286). The box had petitioner's fingerprints on it (293).

For the exposition of the suspect nature of the government's testimony concerning the search and the discovery, the Court is respectfully referred to petitioner's principal brief in the Court of Appeals, pp. 104-107 (being supplied to this Court as part of the record in the Court of Appeals).

Petitioner's version of the events of February 8, 1971.

Petitioner testified that on February 8, 1971, Berenguer, accompanied by Schwartz and Simon, came to his home, retrieved the articles he had left on February 3, 1971 (376-378), the visitors asked to borrow the car belonging to petitioner's wife (379), petitioner refused (379), and his visitors then left (379). Petitioner did not know that they were going to rob a bank (379).

Petitioner also called two alibi witnesses (350-357, 358-365).

> The government's cross-examination of petitioner concerning his having received "Miranda" warnings from an F.B.I. agent, his interrogation by said agent, and his statements and admissions to said agent, notwithstanding the failure of the government, on its case-in-chief, to adduce any evidence regarding any of said matters, and petitioner's denials that he had either received said warnings or made any statements or admissions concerning the robbery.

Notwithstanding the failure of the government, on its case-in-chief, to adduce any evidence concerning the giving of "Miranda" warnings to petitioner by an F.B.I. agent, or the interrogation of petitioner by said agent, or any state-

ments or admissions made by petitioner to said agent during said interrogation, and notwithstanding petitioner's denials that he had either received such warnings (399-400) or made statements or admissions concerning the robbery (394, 397-406), the trial judge permitted the prosecutor to cross-examine petitioner concerning these matters (394-406).

The "Alice-in-Wonderland" "Miranda" hearing

The trial judge ordered a "Miranda" hearing (Miranda v. Arizona, 384 U.S. 436; 1966) to determine whether the F.B.I. agent referred to, one Daniel Long, had given petitioner the required "Miranda" warnings, so that he, the trial judge, might, in turn, decide whether to

permit Long to take the stand in rebuttal of petitioner's denials that he had received such warnings or had made any statements or admissions concerning the robbery (434-447).

Prior to the hearing, the Court advised defense counsel that he would not believe anything petitioner said at the hearing (433).

Defense counsel observed that there would thus be no point in putting petitioner on (433).

The Court agreed, and added that defense counsel would have to make his case on the hearing through cross-examination of Long, the agent, stating, "I just don't believe your defendant" (433).

At the conclusion of the hearing, the Court asked whether there was anything further, and defense counsel reminded the Court that there was no point in putting petitioner on, in view of the Court's earlier statements, and the Court again agreed with defense counsel (443-444).

Thereupon, the Court -- which had heard only the agent -- ruled that the Miranda requirements had been met (444), and the agent was permitted to testify in rebuttal that he had given petitioner the "Miranda" warnings, and that petitioner had made certain statements and admissions to him concerning the robbery (448 et. seq.).

The fatal omission in the agent's testimony

The agent, Long, according to his rebuttal testimony, did not orally advise petitioner of his "Miranda" rights, but merely exhibited to him a paper specifying said rights (450-452).

Mr. Long, however, failed, in his rebuttal testimony, to give any evidence concerning petitioner's response to the exhibition of said paper (see 452). Or, to put it differently, Mr. Long, in his rebuttal testimony, failed to give any evidence that petitioner either understood the warnings set forth on the paper or waived his rights with respect thereto (see 452).

Notwithstanding these facts, the Court permitted the jury to consider Long's evidence in arriving at its verdict.

Schwartz' and Simon's denials of any promise of consideration in exchange for their cooperation

Schwartz and Simon, as noted, had, prior to the trial, each pleaded guilty to bank larceny -- that is, taking money from the bank with intent to steal same (minutes of March 15, 1971, p. 15), in violation of 18 U.S.C. sec. 2113(b). The indictment charged armed robbery in violation of subds. "(a)" and "(d)".

At the time of the trial (April,1971), neither had been sentenced. They were sentenced in June, 1971 (min-

utes of June 18 and 25, 1971).

At the trial, in answer to questions put to him by the prosecutor, Schwartz and Simon each testified that the prosecutor had not made any promise to him of any consideration in exchange for his cooperation (60, 61, 178).

The sentences imposed upon Schwartz and Simon

Subsequent to the conclusion of the trial (it ended April 9, 1971; A-10, A-60), more particularly, on June 18, 1971, Simon was sentenced (minutes of June 18, 1971), and on June 25, 1971, Schwartz was sentenced (minutes of June 25, 1971).

Schwartz and Simon, it will be

remembered, had each testified that he had committed acts of armed bank robbery alleged in the indictment (55, 56, 173), and so the parties stipulated (294-295).

The crime was and is punishable by a fine of not more than $10,000, and a prison term of not more than twenty-five (25) years. 18 U.S.C. sec. 2113(d).

Simon -- who was 25 years of age (minutes of March 15, 1971, p. 3), and had, at the trial, denied that the prosecutor had promised him any consideration in exchange for his cooperation (178) -- was sentenced pursuant to the Federal Youth Corrections Act, 18 U.S.C. sec. 5010 (a), to five (5) years' probation (minutes of June 18, 1971, pp. 6-8; A-63).

Schwartz -- who was 24 years of age (68), and had, at the trial, also denied that the prosecutor had promised him any consideration in exchange for his cooperation (60, 61) -- was also sentenced under the Federal Youth Corrections Act, 18 U.S.C. sec. 5010(b), "to the custody of the Attorney General . . . for imprisonment" (minutes of June 25, 1971, pp. 11-14, A-62).

18 U.S.C. section 5010(b), the statute under which Schwartz was sentenced, authorizes Schwartz' release, conditionally, under supervison, at any time prior to the expiration of four years, or at the time thereof, and requires his discharge unconditionally at the expiration of six years.

The jury at the trial of petitioner did not and could not know the sentences Schwartz and Simon received, and thus did not and could not take such facts into consideration in weighing the evidence on, and determining, the issue whether either Schwartz or Simon or both had, in fact, notwithstanding their denials, been promised consideration in exchange for their cooperation -- consideration which manifestly each received on his sentence.

The sentencing of each had been deferred until he had given his testimony and the jury had rendered its verdict, because the Court and prosecutor evidently did not trust either Schwartz or Simon to keep his end of the bargain if he were sentenced before the trial of petitioner.

Anomalously enough, however, at that trial, Schwartz and Simon were each offered to the jury as a witness the jury could trust.

> The trial court's "blind", incomplete and partisan response to the jury's request for all the testimony on a vital issue -- a response peculiarly prejudicial to petitioner (see item "4" of the "QUESTIONS PRESENTED", pp. 9-11, supra)

Due to the related circumstances (1) that the facts in support of the heading above -- which pose issue "4" of the "QUESTIONS PRESENTED", pp. 9 - 11, supra -- occupy, because of the multi-faceted nature of the trial court's error or errors, ten (10) pages of petitioner's supplemental brief in

the Court of Appeals (pp. 1-10; a copy of said brief is being filed with this Court as part of the record in the Court of Appeals), (2) it would be impossible to set forth these facts within the compass of this petition without garbling both the facts and the contentions based thereon, and (3) in order to avoid extending this petition to inordinate lengths, the Court's attention is respectfully invited to said statement of facts in said supplemental brief. Since similar considerations apply to the contentions predicated on these facts -- the contentions occupy 6-1/2 pages (supplemental brief,pp. 10-17) -- the Court's attention is also respectfully invited to that portion of said brief, epitomized in issue "4" of the "QUESTIONS PRESENTED", pp. 9-11, supra.

Reasons for Granting the Writ

1. The judgment below should be reversed, because the practice summarized in issue "1" of "QUESTIONS PRESENTED", pp. 4-5, supra, as factually presented at pp. 33-38, supra, (a) is not only in conflict with the due process clause of the Fourteenth Amendment to the Constitution of the United States, to the extent that it affected the substantial right of petitioner to a fair trial (and thus should have been noticed as "plain error" by the Court of Appeals, pursuant to Rule 52b of the Federal Rules of Criminal Procedure, and, it is respectfully submitted, should also be noticed by this Court as "plain error", pursuant to Rule 40(1)(d)(2) of the Rules of this

Court, which apparently applies not only to briefs, but to petitions, as well; Stern and Gressman, Supreme Court Procedure (4th Ed.; 1969), p. 299), but (b) the practice is so widespread throughout the federal and state courts of the country, that the question whether it is constitutional or not -- that is, whether it deprives defendants of a fair trial or not -- cries out for adjudication by this Court.

2. The judgment below should be reversed, because the practice or practices referred to in issue "3" of "QUESTIONS PRESENTED", pp. 5-9, supra, as factually presented at pp. 28-33, supra -- the propriety of which practices were upheld by the judgment below

-- were and are in conflict with the holdings of this Court in Miranda v. Arizona, 384 U.S. 436, as explicated in Harris v. New York, 401 U.S. 222, as well as Harris, supra, itself; but they are also of the kind which are likely to recur with considerable frequency, to the prejudice of other defendants, so that the impermissibility of the practices should be declared by this Court.

3. The judgment below should be reversed, because the practice or practices referred to in issue "4" of "QUESTIONS PRESENTED", pp. 9-11, supra, as factually presented in petitioner's supplemental brief in the Court of Appeals (pp. 1-10), and also argued therein (ibid., pp. 10-17), not only

deprived petitioner of a fair trial, and were and are in conflict with the holding of this Court in Bollenbach v. United States, 326 U.S. 607, as well as with the holdings in Pinckney v. United States, 352 F.2d 69, 70 (5 Cir., 1965), and United States v. Braxton, 417 F. 2d 878, 880 (5 Cir., 1969), but they are also of the kind which are likely to recur with considerable frequency, to the prejudice of other defendants, so that the impermissibility of the practices should be declared by this Court.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the

judgment of the Court of Appeals for the Second Circuit.

Respectfully submitted,

Theodore L. Malatesta
250 Broadway
New York, New York 10038

Counsel for petitioner

April 17, 1972

APPENDIX

Judgment of the Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS
For The
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 18th day of February one thousand nine hundred and seventy-two

Present:

Hon. Wilfred Feinberg, U.S.C.J.
Hon. William H. Timbers, U.S.C.J.
Hon. Roszel C. Thomsen, U.S.D.J.

UNITED STATES OF AMERICA,

Appellee,

-against-

MICHAEL DeTORE,

Defendant-Appellant

Appeal from the United States District Court for the Eastern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was submitted by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court

Court be and it hereby is AFFIRMED

It is further ordered that the mandate of this court issue forthwith.

Wilfred Feinberg

Wm. H. Timbers
U.S.C.JJ.

Roszel C. Thomsen
U.S.D.J.

Certificate of Service

IN THE

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1971

NO. A-971

MICHAEL DE TORE,
Also Known As MICHAEL
HAYS, Petitioner

v.

UNITED STATES OF
AMERICA, Respondent

I hereby certify that on the 17th day of April, 1972, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to Robert A. Morse, Esq., United Statee Attorney for the Eastern District of New York, 225 Cadman Plaza East, Brooklyn, New York

11242, counsel for the respondent.

I further certify that all parties required to be served have been served.

Theodore L. Malatesta
250 Broadway
New York, New York 10038

Counsel for Petitioner

LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
JUN 8 1972
MICHAEL RODAK, JR., CLERK

No. 71-1344

In the Supreme Court of the United States

OCTOBER TERM, 1971

MICHAEL DE TORE, A/K/A MICHAEL HAYS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
HENRY E. PETERSEN,
Assistant Attorney General,
JEROME M. FEIT,
STEPHEN J. SUNDVOLD,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statement	2
Argument	5
Conclusion	10

CITATIONS

Cases:	
Caminetti v. *United States*, 242 U.S. 470	6
Caton v. *United States*, 407 F. 2d 367, certiorari denied, 395 U.S. 984	6
Harris v. *New York*, 401 U.S. 222	7, 8
Miranda v. *Arizona*, 384 U.S. 436	7, 8
United States v. *Braxton*, 417 F. 2d 878	9
United States v. *De Palma*, 414 F. 2d 394, certiorari denied, 396 U.S. 1046	9
Walder v. *United States*, 347 U.S. 62	8
Statutes and Rule:	
18 U.S.C. 2	2
18 U.S.C. 2113(b)	5
18 U.S.C. 2113(d)	2
Fed. R. Crim. P., Rule 30	9

467-776—72——1

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1344

MICHAEL DE TORE, A/K/A MICHAEL HAYS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The court of appeals affirmed without opinion (Pet. App.).

JURISDICTION

The judgment of the court of appeals was entered on February 18, 1972. On March 21, 1972, Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to and including April 18, 1972, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner was improperly prejudiced because two admitted accomplices testified after they had pleaded guilty but before they were sentenced.

2. Whether in the circumstances of this case it was error for the trial judge to allow cross-examination of petitioner and testimony by an FBI agent concerning statements made by petitioner to that agent following petitioner's arrest.

3. Whether the trial judge's summary of certain evidence in response to a question from the jury was proper.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of having aided and abetted an armed bank robbery, in violation of 18 U.S.C. 2113(d) and 2, and was sentenced to ten years' imprisonment. The court of appeals affirmed without opinion (Pet. App.).

1. On the morning of February 3, 1971, petitioner met with Hiram Berenguer, Eugene Schwartz, and John Peters in the kitchen of his home to discuss the proposed robbery of the Eastern National Bank at Lake Grove, New York (T. 8, 306). According to Schwartz and Peters, who were confessed accomplices, petitioner planned the robbery and the method of the escape. He described the physical layout of the bank, how the armed robbery would be executed, and explained the proposed getaway and how the money was to be divided (T. 8–10, 307–308). Schwartz asked who

would supply the guns for the robbery and petitioner responded that he would (T. 308). At this point, petitioner went out to his back yard and returned with a metal box containing guns, handcuffs and mace. Together with a brown bag, these items were given to Peters and Schwartz, who were to carry out the actual robbery (T. 11, 309–310). After the robbery the guns and money were to be put in the bag and then given to petitioner who would be waiting near the bank as the robbers fled (T. 310).

The four men, riding in two cars, went to the bank. Peters and Schwartz parked in the bank parking lot while petitioner and Berenguer parked across the street in a shopping center (T. 23). The robbery was not attempted because Peters and Schwartz were frightened by a construction worker who was working near the bank (T. 23, 313–314).[1] Peters and Schwartz left the parking lot and returned with petitioner and Berenguer to petitioner's home. Petitioner reassured the men that "the job was not blown and that he would call the two guys * * * when the job would be right" (T. 315). Schwartz then returned the guns, handcuffs, mace and bag to petitioner (T. 24–25).

On the morning of February 8, 1971, Schwartz, Berenguer and Stuart Simon (a replacement for Peters) decided to try again to rob the Eastern National Bank (T. 158). Berenguer telephoned petitioner and told him that they were coming to get the guns

[1] The worker observed two men in a car whom he considered to be acting suspiciously. He reported this to the bank manager and gave him the license number of the car (T. 262–264).

(T. 391). After the men arrived at petitioner's home, Simon was informed by petitioner of the physical layout of the bank (Tr. 161–162). Petitioner then explained a revised plan. Schwartz and Simon were to drive to the bank and park (T. 165), and petitioner and Berenguer would park across the street. Schwartz and Simon were to enter the bank (T. 165), and Simon was to jump on the counter, scoop up the money and put it in the bag which petitioner had given him (T. 44). Schwartz and Simon were both told by petitioner to spray mace into the eyes of the bank employees and customers so that they would be unable to see the men make their getaway (T. 165). The men were to leave the bank and drive away in Schwartz's car; petitioner would overtake them, and Schwartz was then to throw the bag containing the money, guns, and mace into petitioner's car (T. 51–52, 165–166).

The men left petitioner's home and proceeded to the bank (T. 53, 169). Schwartz and Simon entered the bank brandishing the fully loaded revolvers which had been supplied by petitioner and ordered all employees and customers to "freeze" and lie on the floor. They then took approximately $12,746 (T. 295–296). As Schwartz and Simon drove away from the bank, petitioner's car was behind them (T. 56, 173). The cars pulled alongside each other and Simon handed the bag containing the money, guns, and mace to petitioner. At the next intersection, the cars parted and went separate ways. (T. 57–58, 173–175). The next day (February 9, 1972) petitioner's back yard was searched pursuant to a search warrant. The executing

officer found a grey metal box containing several revolvers, handcuffs and mace. Petitioner's fingerprints were on the box (T. 282, 285–286, 288).

2. On February 9, 1971, the F.B.I. dispatched Special Agent Long to the Suffolk County Police Department to transport petitioner, who had been arrested the night before, to the federal courthouse in Brooklyn for arraignment (T. 435–436). During the trip, Agent Long furnished petitioner with a form explaining his constitutional rights, which he observed petitioner reading. When Long asked petitioner if he understood the contents of the form, petitioner answered affirmatively, but returned the form unsigned (T. 430, 451–452). Long then asked petitioner about the robbery of the Eastern National Bank. Petitioner stated that Berenguer had visited him at his home about a week before the robbery and had left several revolvers there. From this, petitioner surmised that Berenguer was preparing to pull a job. Petitioner also stated that on the morning of the actual robbery, Berenguer and two other men came to get the guns and asked him if he wanted to drive the getaway car; they did not specify where they were going (T. 453). He told the agent that Berenguer returned to petitioner's house later that day, and that petitioner drove him to Queens, and indicated that if he made bail, he would attempt to get the guns and money and turn them over to the F.B.I. (T. 454).

ARGUMENT

1. Petitioner contends that since both Schwartz and Simon, who had pleaded guilty to violating 18 U.S.C. 2113(b) prior to petitioner's trial, had not yet been

sentenced at the time they testified at trial, the truthfulness of their testimony was so suspect as to deny him a fair trial. This contention is without merit. It is settled that a conviction may rest solely on the testimony of an accomplice (see *Caminetti* v. *United States*, 242 U.S. 470, 495), and that the fact that the accomplice may have expected to receive a lesser penalty for testifying does not render his evidence unacceptable (see *Caton* v. *United States*, 407 F. 2d 367, 371 (C.A. 8), certiorari denied, 395 U.S. 984, and cases cited). The trial judge here took special care in his charge to alert the jury of the witnesses' admitted participation in the crime and instructed the jury that it should take into account the fact that since Schwartz and Simon were still subject to punishment, they were amenable to suggestion by the government and might "try to court the prosecutor's favor to avoid some punishment themselves" (T. 500–521).

2. Petitioner claims that it was reversible error for the trial judge to permit the government to cross-examine him regarding his conversation with Agent Long, as well as to permit Long to testify in rebuttal with respect to that conversation.

On several occasions during direct and cross-examination, petitioner denied that he had ever discussed the robbery of the Eastern National Bank with Berenguer, Schwartz or Simon and stated that he was unaware that there was a plan to rob it (T. 372, 374–375, 378, 389, 393). In the face of petitioner's persistent denials of participation in the robbery and of any knowledge thereof, the prosecutor proceeded to question petitioner about his conversation with Agent

Long (T. 394). When defense counsel objected to this line of questioning, the trial judge instructed the jury (T. 396) that:

> * * * any statements that may be asked on cross-examination which suggest that this defendant said something at an earlier date which is contradictory of what he now says, may be used by you only in assessing the credibility of this witness and not in determining the truth of what happened on that prior occasion.

Petitioner then testified that he did not remember if he had been advised of his rights by Agent Long or if he had told the agent that he knew that Berenguer was preparing some sort of robbery and that he had been asked to go along as the driver of the getaway car on the job (T. 398–401). He first denied telling the agent that he had been asked to drive the getaway car (T. 403), but then stated that he did not recall (T. 409). At this point the prosecutor asked to call Agent Long as a rebuttal witness, relying on *Harris* v. *New York,* 401 U.S. 222 (T. 411). While the court recognized that *Harris* permitted direct impeachment of the defendant (T. 412), he questioned whether that decision authorized the agent's testimony.

To obviate the problem, a hearing was conducted outside the presence of the jury to determine whether the statements were made to Agent Long after compliance with the requirement of *Miranda* v. *Arizona,* 384 U.S. 436 (T. 424, 429). Agent Long, a member of the Ohio bar, told the court that he had given petitioner the full *Miranda* warnings in writing, that petitioner appeared to read the form and

stated that he understood his rights, and that petitioner would not sign the form (T. 429–430). While petitioner did not testify at this point,[2] he had earlier testified during cross-examination that he could not remember if Agent Long had advised him of his rights. The judge ruled that he had been so advised and, accordingly, that the *Miranda* requirements had been satisfied (T. 444–445).

Under *Harris* (see also *Walder* v. *United States*, 347 U.S. 62), the statements made by petitioner to Agent Long were admissible for impeachment[3] even if petitioner did not receive *Miranda* warnings; since the evidence was sufficient to support the district court's finding that petitioner had received and understood such warnings, the statements were also admissible under *Miranda*.

3. During the jury's deliberation, a note was sent to the court which asked "What two cars were used at the bank, and color and make" at the time of the robbery (T. 529). Initially, the trial judge called the jury into the courtroom in order to clarify what they wanted to know. After several of the jurors indicated that they wanted to hear all the testimony on the second car (T. 535–537), he excused them while he

[2] The trial court had advised defense counsel that he would not believe whatever petitioner said on this matter (T. 433).

[3] Despite the compliance with the *Miranda* requirements, the statements were introduced solely on the question of credibility (T. 519–520).

and counsel determined how the question was to be answered (T. 537–539). Petitioner's counsel suggested that the judge advise the jury "what one witness said, as stated, it was a dark blue General Motors car," and pointed out that, while "the other witness said it was a dark blue Pontiac at the trial" he had not made such a precise identification in a pre-trial statement given to the government (T. 540–541). The judge then proposed an answer which incorporated defense counsel's suggestion, and reviewed it with counsel. Petitioner's counsel stated that the proposed answer was "all right" (T. 543); the jury was recalled and the answer was read to them (T. 543–544).

Petitioner now asserts that this answer to the jury's question was error on the ground that it was incomplete and made no reference to the witnesses by name. Since defense counsel agreed to the proposed answer and made no objection either before or after it was given, petitioner should not now be heard to complain. See Rule 30, Fed. R. Crim. P. In any event, it is within the broad discretion of the trial judge to determine whether the testimony in issue should be read to the jury in its entirety or summarized. There has been no showing that petitioner was prejudiced because the court, with the agreement of counsel, decided to summarize the evidence. Compare *United States* v. *Brexton*, 417 F. 2d 878, 880 (C.A. 5); *United States* v. *De Palma*, 414 F. 2d 394, 396–397 (C.A. 9), certiorari denied, 396 U.S. 1046.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.
HENRY E. PETERSEN,
Assistant Attorney General.
JEROME M. FEIT,
STEPHEN J. SUNDVOLD,
Attorneys.

JUNE 1972.

U.S. GOVERNMENT PRINTING OFFICE: 1972

SUPREME COURT, U. S.

FILED

JUN 20 1972

NO. 71-1344

IN THE SUPREME COURT
OF THE UNITED STATES
OCTOBER TERM, 1971

MICHAEL DE TORE, a/k/a
MICHAEL HAYS, Petitioner

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED
STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

THEODORE L. MALATESTA
250 Broadway
New York, New York 10007

Counsel for petitioner

June 14, 1972

INDEX

Page

ARGUMENT 2

I - The government has misconceived, misstated and failed to deal with question "1" of the "Questions Presented" in the petition, and has also failed to respond to petitioner's argument that a writ should issue as to said question (replying to the government's brief, pp. 5-6; "Argument 1.") 2

II - Contrary to the government's contention or suggestion, the error committed by the trial court' - ... , incalculably prejudicial to petitioner, in advising petitioner's counsel, at the "Miranda" hearing, that it would not believe anything the defendant might say at the hearing - so that it was futile for petitioner to take the stand, and, accordingly, he did not do so - was not cured by the fact that petitioner had previously, during cross-examination, testified that he had not been advised of his "Miranda" rights (replying to the government's brief, pp. 7-8; "Argument 2", and in further support of questions "3b" and "3c" of the "Questions Presented" in the petition).. 11-12

INDEX (Continued)

Page

III - The silence of the government's brief concerning the undisputed fact that Agent Long, in his rebuttal testimony before the jury, failed to give any evidence that prior to petitioner's making his alleged statements to Long (concerning which Long testified in his rebuttal testimony before the jury), petitioner had either indicated that he understood the "advice of rights" form allegedly shown to him by Long (the only way in which, Long claimed, he advised petitioner of his "Miranda" rights), or had waived his rights with respect to said "Miranda" rights (in further support of petition, questions "3d" and "3e" of the "Questions Presented"; petition, pp. 5-7, 32).. 17-18

IV - Petitioner's silence with respect to other portions of the government's brief. 20

Conclusion 20

INDEX (Continued)

Citations

	Page
Miranda v. Arizona, 384 U.S. 436	18, 19
Harris v. New York, 401 N.Y. 222	18, 19

Rules

Rule 40(1)(d)(2) of the Rules of the Supreme Court.	10
Rule 52(b) of the Federal Rules of Criminal Procedure	9

NO. 71-1344

IN THE SUPREME COURT
OF THE UNITED STATES
OCTOBER TERM, 1971

MICHAEL DE TORE, a/k/a
MICHAEL HAYS, Petitioner

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED
STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

ARGUMENT *

I

THE GOVERNMENT HAS MISCONCEIVED, MISSTATED AND FAILED TO DEAL WITH QUESTION "1" OF THE "QUESTIONS PRESENTED" IN THE PETITION, AND HAS ALSO FAILED TO RESPOND TO PETITIONER'S ARGUMENT THAT A WRIT SHOULD ISSUE AS TO SAID QUESTION

(replying to the government's brief, pp. 5-6; "ARGUMENT 1.")

Question "1" of the "QUESTIONS PRESENTED" in the petition (petition, pp. 4-5), as well as the facts in connection therewith (ibid, pp. 21, 33-37, to be read with pp. 16-19, 21-28), together with the argument based thereon (ibid, pp. 37-38, 40-41, to be read with pp. 11-

*The case, as the prosecutor admitted, turned on the credibility of the witnesses (500, 485-486; see also Charge: A-22 to A-25).

16), presents the issue of the constitutionality (under the due process clause) of the common, everyday practice followed in all federal, as well as state, courts throughout the country, of deferring the sentencing of a defendant who has pleaded guilty, but has agreed to testify against a co-defendant or co-defendants, until after he has testified and the trial has been concluded, with the result that the trial jury, in determining whether or not the guilty-pleading defendant has been promised consideration, at the time of sentencing, for his cooperation, and has thus weighted his testimony in favor of the prosecution, is deprived of information relevant and material to said issue - namely, the nature and extent of the sentence ultimately imposed upon the guilty-pleading defendant, and the relationship of that sentence to the punishment which can be visited upon him.

The practice described above involves an extraordinary anomaly, which, in turn - and we say this with the utmost deference - amounts to the perpetration, by both the Court accepting the plea and the prosecutor, upon the jury deciding the fate of the co-defendant or co-defendants, of a species of fraud.* That anomaly and fraud consist in the following diametrically opposed facts, respectively labeled "(a)" and "(b)".

(a) The sentencing of the guilty-pleading defendant is so deferred because neither the Court accepting the plea nor the prosecutor trusts the guilty-pleading defendant, if he is sentenced before the trial of his co-defendant or co-defendants, to carry out his promise to testify, and to do so adversely to his co-defendant or co-defendants; that is, the Court and prosecutor consider the said

* Petition, pp. 37-38

promise of the guilty-pleading defendant, if he is sentenced before said trial, unworthy of belief (petition, p. 37).

(b) On the other hand, at the trial of the co-defendant or co-defendants, the guilty-pleading defendant, as well as his testimony, is represented to the jury - by at least the prosecutor - as being worthy of belief (petition, p. 38).

The Jekyll-and-Hyde practice, we respectfully submit, thus amounts to the perpetration, by both the Court accepting the plea and the prosecutor, upon the jury weighing the fate of the co-defendant or co-defendants, of a species of fraud. Otherwise, why not sentence the guilty-pleading defendant prior to the trial of the co-defendant or co-defendants?

The only proper course is to require that the guilty-pleading defendant be sentenced prior to the trial of the

co-defendant or co-defendants.. If the guilty plea is not offered and accepted until the trial is under way, sentence should be imposed before the guilty-pleading defendant takes the stand to testify against the co-defendant or co-defendants.

Only in this way, can the jury be enabled to determine, with all the relevant facts in its possession, the question whether the guilty-pleading defendant has been promised consideration, at the time of sentencing, for his cooperation, and has thus weighted his testimony in favor of the prosecution.

Completely and utterly misconceiving the question presented, as well as the thrust of petitioner's position, as stated above, the government asserts that petitioner is contending merely

(a) that, in the circumstances presented, the truthfulness of the testimony of the guilty-pleading defendant is so suspect - presumably, as a matter of law - as to amount to a denial to the co-defendant or co-defendants on trial of a fair trial, because (1) the guilty-pleading defendant expects to receive consideration, at the time of sentencing, in exchange for testifying, and (2) he has not yet been sentenced (government's brief, "Argument 1.", pp. 5-6).

Manifestly, the government's statement of the question presented, as well as of petitioner's contention or contentions, is egregiously wide of the mark, and does not reflect, in the slightest degree, the question or petitioner's contentions.

Put differently, the government

(a) that, in the circumstances presented, the truthfulness of the testimony of the guilty-pleading defendant is so suspect - presumably, as a matter of law - as to amount to a denial to the co-defendant or co-defendants on trial of a fair trial, because (1) the guilty-pleading defendant expects to receive consideration, at the time of sentencing, in exchange for testifying, and (2) he has not yet been sentenced (government's brief, "Argument 1.", pp. 5-6).

Manifestly, the government's statement of the question presented, as well as of petitioner's contention or contentions, is egregiously wide of the mark, and does not reflect, in the slightest degree, the question or petitioner's contentions.

Put differently, the government

has misconceived and misstated the question and petitioner's contentions. Compare Question "1", petition, pp. 4-5; 37-38, 40-41, with government's brief, pp. 5-6, "Argument 1".

Moreover, not only has the government misconceived and misstated the question presented, as well as petitioner's argument, but, in doing so, it has also failed to deal with the question, as well as petitioner's argument, and thus has failed to answer the reasons advanced by petitioner why a writ should issue as to said question, particularly in view of the fact that the practice described is such a common and widespread one, followed every day in criminal cases, by all federal, as well as state, courts throughout the country, and involves the anomaly and fraud - described at pp. 4-5, supra - consisting in the Court and prosecutor, on the one hand, believing the guilty-pleading defendant unworthy of belief (witness the deferment of his sentencing), but, on the other hand, representing him to the trial jury as worthy of belief.

THE FACTS INVOLVED IN QUESTION "1" WERE CALLED TO THE ATTENTION OF THE COURT OF APPEALS BY PETITIONER

(in further support of granting the writ as to Question "2").

Question "2" of "Questions Presented" in the petition reads as follows:

"2. Whether the violation of the due process clause referred to in '1' above amounts to 'plain error' 'affecting' the 'substantial rights' of a defendant, within the meaning of Rule 52(b) of the Federal Rules of Criminal Procedure, which a Court of Appeals may notice, as well as 'plain error', within the meaning of Rule

40(1)(d)(2) of the Rules of this Court, which this Court may notice."

The facts involved in Question "1" (see petition, pp. 21, 34-38) were called to the attention of the Court of Appeals by petitioner ("APPELLANT'S BRIEF" - principal brief - in that Court, pp. 3 and 4).

II

CONTRARY TO THE GOVERNMENT'S CONTENTION OR SUGGESTION, THE ERROR COMMITTED BY THE TRIAL COURT' , INCALCULABLY PREJUDICIAL TO PETITIONER, IN ADVISING PETITIONER'S COUNSEL, AT THE "MIRANDA" HEARING, THAT IT WOULD NOT BELIEVE ANYTHING THE DEFENDANT MIGHT SAY AT THE HEARING - SO THAT IT WAS FUTILE FOR PETITIONER TO TAKE THE STAND, AND,ACCORDINGLY, HE DID NOT DO SO - WAS NOT CURED BY THE FACT THAT PETITIONER HAD PREVIOUSLY, DURING CROSS-EXAMINATION, TESTIFIED THAT HE HAD NOT BEEN ADVISED OF HIS "MIRANDA" RIGHTS

(replying to the government's brief, pp. 7-8; "ARGUMENT 2",

and in further support of question "3b" and "3c" of the "QUESTIONS PRESENTED" in the petition).

Expressly acknowledging that the trial court, at the "Miranda" hearing, advised petitioner's counsel that it would not believe anything petitioner might say at the hearing (brief, pp. 7-8) - with the result that it was futile for petitioner to take the stand, and, accordingly, he did not do so (petitioner, pp. 30-31), the government nevertheless contends, or suggests (brief, p. 8; in answer to petition, questions "3a" and "3b", pp. 5-7; and pp. 29-31), that the trial court's error, for such it clearly was (and one that was incalculably prejudicial to petitioner), was cured by the fact that petitioner had previously, during cross-examination, (as the record indi-

cates, 399, although the government's brief misstates the record, brief, p. 8; and see next paragraph), denied that he had been advised of his "Miranda" rights (brief, p. 8) - testimony, of course, which the Court heard and disbelieved, in accordance not only with his statements to petitioner's counsel concerning the Court's refusal to give credence to anything petitioner might say, but also in accordance with the Court's ruling, at the conclusion of the Miranda hearing - at which the only witness was the government Agent Long, who testified that he had advised petitioner of his Miranda rights (petition, p. 31; government's brief, p. 8, first - and incomplete - paragraph) - that Agent Long had advised petitioner of his "Miranda" rights (444-445).

Before we set forth the reasons

why the government's contention is without merit, we are required to call the attention of the Court to the fact that the government's brief does not accurately reflect petitioner's testimony, given during his cross-examination, concerning the question whether he had been advised of his "Miranda" rights. The government's brief alleges, first, that

> "Petitioner then testified that he did not remember if he had been advised of his rights by Agent Long (T 398-401.)" (Brief, p. 7).

and, secondly, that

> ".....petitioner testified during cross-examination that he could not remember if Agent Long had advised him of his rights." (Brief,

p. 8).

Each of the foregoing statements of petitioner's testimony is egregiously inaccurate. What petitioner testified to, in response to a question by the prosecutor as to whether or not he remembered Agent Long's having shown him an Advice of Rights form, enumerating certain specified rights, was that he did not remember Agent Long's having done so (399). The "Advice of Rights" form is Government's Exhibit 18 in evidence (admitted, 440-441), and is reproduced in the volume of "Exhibits" which petitioner filed with the Court of Appeals in support of his appeal (p. E-2).

Returning now to the government's suggestion or contention that

the trial court's error was cured by the fact that petitioner had testified, during cross-examination - as the record shows (399) - that he had not been advised of his "Miranda" rights (brief, p. 8), the government's suggestion or contention is without merit. For petitioner was entitled, at the Miranda hearing, to testify and to have the Court consider not only (a) his denial that Agent Long had advised him of his Miranda rights, but also (b) petitioner's testimony at said hearing concerning all the circumstances surrounding Agent Long's allegedly having advised him of his rights. As indicated, the trial court did not accord petitioner said right. This was, admittedly, towering error.

III

THE SILENCE OF THE GOVERNMENT'S BRIEF CONCERNING THE UNDISPUTED FACT THAT AGENT LONG, IN HIS REBUTTAL TESTIMONY BEFORE THE JURY, FAILED TO GIVE ANY EVIDENCE THAT PRIOR TO PETITIONER'S MAKING HIS ALLEGED STATEMENTS TO LONG (CONCERNING WHICH LONG TESTIFIED IN HIS REBUTTAL TESTIMONY BEFORE THE JURY), PETITIONER HAD EITHER INDICATED THAT HE UNDERSTOOD THE "ADVICE OF RIGHTS" FORM ALLEGEDLY SHOWN TO HIM BY LONG (THE ONLY WAY IN WHICH, LONG CLAIMED, HE ADVISED PETITIONER OF HIS "MIRANDA"

RIGHTS), OR HAD WAIVED HIS RIGHTS WITH RESPECT TO SAID "MIRANDA" RIGHTS (in further support of petition, questions "3d" and "3e" of the "QUESTIONS PRESENTED"; petition, pp. 5-7, 32).

The government's brief is silent concerning the undisputed fact, set forth in the petition (p. 32), that Agent Long, in his rebuttal testimony before the jury, failed to give any evidence - evidence required before petitioner's alleged statements to Long could be admitted as part of the government's case, and considered by the jury (Miranda v. Arizona, 384 U.S. 436, 475-476; Harris v. New York, 401 U.S. 222) - that petitioner, prior to making said alleged statements to Long, either indicated that he understood the "Advice of Rights" form allegedly shown to

him by Long (the only way in which, Long claimed, he advised petitioner of his "Miranda" rights)*, or waived his rights with respect to said "Miranda" rights.

Notwithstanding this fatal omission in Long's rebuttal testimony, the Court permitted Long to testify before the jury to statements petitioner allegedly had made to Long (453-457), and also instructed the jury that they should consider such evidence (A-23).

All this was unmistakable error, seriously prejudicial to petitioner, Miranda v. Arizona, supra, 384 U.S., at pp. 475-476; Harris v. New York, supra, 401 U.S. 222.

---

* see 451-452

IV

PETITIONER'S SILENCE WITH RESPECT TO OTHER PORTIONS OF THE GOVERNMENT'S BRIEF.

Petitioner's silence with respect to other portions of the government's brief is not to be taken as signifying acquiescence by petitioner in the correctness of the government's arguments or conclusions. These other portions do not raise new matter requiring reply.

CONCLUSION

For all the reasons stated in the petition and herein, a writ of certiorari should issue to review the judgment of the Court of Appeals for the Second Circuit.

Respectfully submitted,

THEODORE L. MALATESTA
Counsel for petitioner

Certificate of Service

NO. 71-1344

IN THE SUPREME COURT
OF THE UNITED STATES
OCTOBER TERM, 1971

MICHAEL DE TORE, a/k/a
MICHAEL HAYS, Petitioner

v.

UNITED STATES OF AMERICA

I hereby certify that on the day of June, 1972, three copies of the within Petitioner's Reply Brief were forwarded, via United States mail, postage prepaid, to Hon. Erwin N. Griswold, Solicitor General of the United States, Department of Justice, Washington, D.C. 20530.

I further certify that all parties required to be served have been

served.

Theodore L. Malatesta
250 Broadway
New York, New York 10007

Counsel for petitioner